

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1447

To be argued by

ROBERT J. RAPOPORT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1447

UNITED STATES OF AMERICA,

Appellee,

-against-

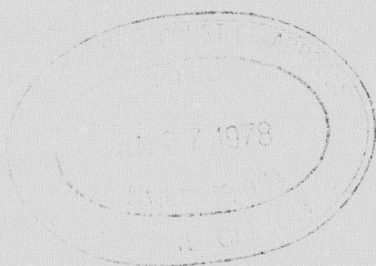
JOSE EDGAR LOPEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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UNITED STATES COURT OF APPEALS
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Docket No. 77-1447

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSE EDGAR LOPEZ,

Appellant.

BRIEF FOR THE APPELLANT

Preliminary Statement

Jose Edgar Lopez appeals from a judgment entered on September 23, 1977, in the United States District Court for the Eastern District of New York (Mark A. Costantino, J.) convicting him following a jury trial of the one count indictment which charged a conspiracy to unlawfully import into the United States and to possess with intent to distribute cocaine in violation of Title 21, United States Code, Sections 841(a)(1), 952(a) and 960(a)(1) and Title 21, United States Code, Section 846. Appellant was sentenced to five years imprisonment, to serve six months and the balance

on probation, a special parole term of ten years and deportation. In lieu of the Appellant serving the above sentence the Court afforded the Appellant the opportunity to voluntarily depart from the United States and return to his home in Columbia prior to October 6, 1977. The Appellant appealed and the sentence was stayed pending the appeal. The Appellant was authorized to appeal in forma pauperis. A motion having been made for an extension of time to file the brief and appendix with the record on appeal the order of this Court dated November 11, 1977, was amended by order dated January 13, 1978, and by second motion further amended on January 25, 1978 requiring that the brief and appendix be filed on January 27, 1978. That order was amended on January 30, 1978, authorizing the filing of the brief and appendix with the record on appeal to be filed on January 30, 1978.

THE ISSUES

The issues presented by this appeal are:

I. Whether the prosecutor's statement in closing argument calling upon the Appellant's counsel to explain a taped telephone conversation and commenting on Appellant's failure to offer evidence constituted a constitutional abridgment of Appellant's rights against self-incrimination under the Fifth Amendment constituting reversible error.

II. Whether the District Court's failure to issue cautionary instructions to the jury that no adverse inference could be drawn from Appellant's failure to testify or produce evidence in his behalf constituted reversible error.

III. Whether the evidence was insufficient as a matter of law so that the Court erred in denying Appellant's motion to dismiss the indictment at the conclusion of the governments case.

STATEMENT OF FACTS

Appellant was charged in a one count indictment with conspiring between June 1, 1976, and February 1, 1977, together with Arturo Romero, an unindicted co-conspirator and other persons unknown, to unlawfully import into the United States from Venezuela and possess with intent to distribute 328 grams of cocaine.

Romero, also known as Angel Granadillo, having pled guilty to one count of his indictment, testified as the government's key witness, while awaiting sentence. Therefore the government's entire case is based upon the testimony of Romero, Special Agents Joseph J. Giamo, John Huber and John Cipriano, of the drug enforcement administration (1) and a taped telephone conversation between between Romero and the Appellant made on the day of Romero's arrest, to wit: February 1, 1977. The Appellant did not take the stand.

(1) The pages of the transcript of the first days proceedings, July 26, 1977, are numbered 1 through 88. The pages of the transcript of the second days proceedings, July 27, 1977, are numbered 99 through 233. Starting with the transcript of the third days proceedings, it also begins with page 1 and continues through page 88. The pages of the transcript of the fourth days proceedings, July 29, 1977, also begin at page 1 and continue through 100. Hereafter, references to page numbers alone, e.g., (124) are to transcripts of July 26, 1977 and July 27, 1977; references to page numbers with an "A" prefix, e.g., (A-57) refer to the transcript of July 28 and references to page numbers with a "B" prefix refer to transcripts beginning and ending on July 29, 1977, the end of the trial.

"EX" shall refer to exhibits introduced at the trial with the page number following immediately thereafter, e.g., (EX 3) Romero's Grand Jury testimony of February 17, 1977 will be referred to as (GJ 1) and the page following thereafter and Grand Jury testimony of March 31, 1977, will be referred to as (GJ 2) with the page number following thereafter. e.g., (GJ 1-5)

Arturo Romero testified that he had come to the United States four times. (12). He had previously testified that he had been to the United States a total of three times (GJ1-6).

He told the Grand Jury that he had met the Appellant on his second visit to the United States. He claimed that at that time, the Appellant had "mentioned something concerning that" referring to cocaine. (GJ2-4) However, on cross examination he recanted his testimony and said that he could not remember any discussion about cocaine with the Appellant on his second visit.

He left the United States after his second trip and returned two months later in December, 1975. (15) He stayed in New York until the early part of August, 1976. Testifying with regard to the alleged commencement of the conspiracy, Romero gave the following testimony before the Grand Jury:

" Q Was it on this trip, the trip between December of '75 and July or August of '76, that you and Mr. Lopez first spoke about bringing cocaine to the United States?

A. Well, I know the second time he had mentioned something concerning that.

Q. But you specifically talked about it, about your bringing cocaine from Venezuela to New York on the third trip or the second trip?

A. No, on the fourth trip.

Q. Well, let's do it this way: When you say fourth trip, you mean you first talked to Mr. Lopez about bringing cocaine into the United States on this trip? When did you arrange that?

A. It was the third trip. (GJ 2-4)

He then stated on Direct examination that before returning to Venezuela in August, 1976, he went to Appellant's apartment and explained that he had to leave because he had no money. He said that "is when he explained to me that I could bring him cocaine. . . and that the day I left he said I should wait and he would call me." That constitutes the entire testimony which the government alleges constituted the inception of the conspiracy. (19)

However, on cross examination Romero completely contradicted his previous testimony before the Grand Jury and on direct examination. When asked to give the date that he claimed he had originally had a conversation with the Appellant respecting cocaine for the first time Romero stated it was in January, 1977. He reiterated that was the first time such conversation was had between he and the Appellant. He subsequently sought to revert back to his previous testimony. However, after being compelled by his own previous testimony on cross examination to acknowledge that he had stated three times under oath that the first time he discussed bringing cocaine into this country with the Appellant was January, 1977, and not August, 1976, Romero declined the offer of Appellant's counsel to change his testimony from January, 1977 to his original testimony on direct and before the Grand Jury. (68-72)

In abandonment of his prior testimony, Romero testified that he and the Appellant in fact, entered into an agreement to bring cocaine into the United States by virtue of a telephone conversation in early January, 1977. (77-78).

The government did not ask Romero any questions, whatsoever, on direct examination about the alleged early January telephone call which Romero testified to on cross examination, after Romero had said simply that the Appellant called him in early January. (19).

Romero then testified that when Lopez allegedly called him in early January, the extent of their conversation was "that's when he mentioned about the favor, and then I said that -- Yes." which he understood to be the favor of cocaine. (78) Romero was unable to establish the date of the alleged call in early January and constantly referred to that conversation having taken place in February. (73) There was no testimony that at the time of this early January, 1977 telephone call there was any discussion as to when Romero would come to New York with any cocaine or the date of his arrival. There was no testimony at the trial that

that there was any other communication between Romero and the Appellant until on or about January 30, 1977.

Romero testified that he then met with a man by the name of Ceasar who the Appellant allegedly said would contact Romero. He met Ceasar who picked up Romero at his home and took him to a little Town called Tocqyito. After a few drinks they returned to Romero's home whereupon Ceasar gave the cocaine to Romero. He gave Romero money, airplane tickets and told Romero how to strap the cocaine to his back.(21) On cross examination he acknowledged that he had lied to Agent Cipriano when he stated to Cipriano that he had gone to Kukuta, Columbia to meet Ceasar and it was there that Ceasar gave him the cocaine when Ceasar put the cocaine in the tire of Romero's car.(118-123) He stated that he received the cocaine from Ceasar two days before he came to the United States, that would be on or about January 30, 1977. (120)

He testified that Ceasar gave him the cocaine. He stated that Ceasar advised him how to get a passport and come to the United States and helped him get a passport as well as providing him with money. (GJ 1-5) However, when asked on cross examination the exact question that the prosecutor had asked him before the Grand Jury, "Did Ceasar advise you how to get a passport and come to the United States?" Romero said, "No. Lopez advised me," and after confrontation with his Grand Jury testimony claimed they both advised him. (127-128)

There was no testimony on direct examination that Romero spoke with the Appellant until February 1, 1977. However, on cross examination, Romero for the first time said that he received a telephone from the Appellant in New York (93) on or about January 30, 1977. Although Romero claimed he had told the Government about this alleged call, the government asked Romero no questions either before the Grand Jury or on direct examination relative to the nature of such telephone call.

Romero said that it was Lopez who called him on January 30, 1977, from New York. (110) He stated that the Appellant called and asked why Romero had not left on that day, approximately January 30, 1977, and that Romero responded that he had not gotten certain vaccine. (124)

Romero was asked on cross examination whether he had told Agent Giamo when he was interviewed after his arrest that it was he, Romero, who had called the Appellant and not the Appellant who called Romero. When confronted with the fact that Appellant's attorney was reading from Agent's Giamo's notes, and asked whether he said this to Agent Giamo, Romero then responded, "I don't know . . . I am not sure..... I don't remember." (111-112) It was apparent that these January telephone calls were a complete fabrication since there was no testimony by Romero or anyone else on the part of the government that the Appellant was ever informed when Romero was to come to the United States. That being the case it defies credibility and logic that the Appellant, not knowing when Romero was to come to the United States, would call Romero and ask why he had not arrived at a designated time/^{of} which he had no demonstrably knowledge.

Nor is there any testimony explaining why Romero could not at least have remembered who made the January 30, 1977 telephone call.

Romero boarded a plane to New York from Venezuela on February 1, 1977, and arrived at Kennedy International Airport on February 1, 1977, at approximately 1:15 P.M.

After checking his papers the immigration authorities arrested Romero and upon finding him in possession of a drug turned him over to Drug Enforcement Special Agents. (22) The time of arrival was stipulated to by counsel. (138)

At the time of his arrest, Romero told the Special Agents, that he was going to be picked up at the airport(23); that he had to deliver the drugs outside the airport (66); that he did not know anything (23); that someone was to meet him in the International Arrivals Building (B-6); and finally offered the Special Agents the last alternative, to wit: that he had to call someone (23) He told this to the Agents only after he had stood in the Lobby of the International Arrivals Building at Kennedy Airport for approximately one hour, without being met. (B-54) Agent Giamo acknowledged, however, that there were a multitude of possibilities why he may not have been approached by the person who was to meet him at the airport. (54) and that Romero's first story that he was to be met in the lobby of the airport, could have been true (55).

Romero then told the Agent he was to call the Appellant and after consenting to the government's recording a tape of that call, gave the government the telephone number of Appellant and they dialed the number.

The taped telephone conversation was recorded and transcribed. The tape was played to the jury and a Court interpreter translated the conversation from Spanish to English from the recording before the jury. The transcript makes no reference, whatsoever, to any criminal conversation or criminal act in support of the indictment.

Appellant said that he would meet him at 55th Street and Seventh Avenue in Manhattan. (34) The tape or transcript indicates that the Appellant told Romero he would meet him on 55th Street and Seventh. There was no agreement as to which part of the Street they would meet and no testimony that Appellant told Romero that he would meet him inside a coffee shop.

Five Agents in three cars took Romero to within four blocks of 55th Street and Seventh Avenue. They then placed Romero in a cab which dropped him off at the aforesaid street. Romero testified it was very cold and he was inappropriately attired so in derogation

of his agreement to meet Appellant at 55th Street and Seventh Avenue, he went into the coffee shop on the corner of that Street where he sat for an hour. There was no testimony that Romero and the Appellant had ever met in this coffee shop before or that either Romero or Appellant had expected Romero to go into the shop.

Agent Giamo testified that when he entered the coffee shop Romero was seated in a booth by the window which faced Seventh Avenue. (B-40)

Agent Huber testified stated that he had been standing next to Appellant in front of the Sheraton Hotel across the street from the coffee shop and testified that looking into the coffeeshop he could see Romero. (B-18,19) However there was no testimony that Romero had ever provided Huber with a description of Lopez which would insure that Huber would recognise Lopez and stand close by him.

Agent Cipriano who also did not have a description of the Appellant according to the testimony given at the trial, also claimed to have the Appellant under surveillance. While Agent Huber testified that the Appellant moved around on the same side of the street for forty five minutes, (B-20) Agent Cipriano testified he observed the Appellant standing mid-way in the block in front of the hotel (222) and he stood in the same location for some 45 minutes. There was no testimony offered that could prove, when and if, the Appellant actually saw Romero in the coffee shop prior to the time that he entered the shop. There is also no evidence that Romero, though sitting at a window for about one hour facing Seventh Avenue ever saw Appellant. If in fact, Appellant could be seen at all, it would have been reasonable for Romero to see the Appellant and call to him since he had not agreed to meet him in a coffee shop, and he had not been instructed by the Agents to remain the coffee shop. However, Romero stated that

that he stayed in the coffee shop for at the same table for almost an hour and that the first time he saw the Appellant was when he entered to coffee shop. (36)

At the time that Romero met the Appellant in the coffee shop they had no conversation relative to narcotics or the alleged conspiracy. (185-187)

Romero was asked if he had ever been involved in narcotics or cocaine prior to the time that he Ceasar gave him this cocaine on or about January 30, 1977. (54, 117)

Romero answer "Never, That was the first time." (117) However, while being questioned about where he had received the cocaine following admission was made:

"Q. Since you lied, amongst your other lies, would you tell me what the truth is, please?

A. Well, the truth is this. That it was delivered to me at the door of my house." (referring to cocaine)

"Q. So you never in fact got it in Kukuta, Columbia; is that correct?

A. Right. I never did receive it there.

Q. And when -- did you tell the agent this more than once?

A. Yes, I did say that.

Q. Each time was a lie?

A. No. I had told him that I had lied and that I had received it in my house many times. (Emphasis supplied)

A R G U M E N T

Point I

PROSECUTOR'S STATEMENT IN CLOSING ARGUMENT CALLING UPON APPELLANT'S COUNSEL TO EXPLAIN A TAPED TELEPHONE CONVERSATION AND COMMENTING ON APPELLANT'S FAILURE TO OFFER EVIDENCE CONSTITUTED A CONSTITUTIONAL ABRIDGMENT OF APPELLANT'S RIGHTS AGAINST SELF-INCRIMINATION, UNDER THE FIFTH AMENDMENT

At the trial Appellant chose not to take the witness stand in his own defense. The Government introduced as a major source of its evidence in proof of the indictment a taped telephone conversation initiated by the unindicted co-conspirator, ROMERO, to the Appellant.

In his closing argument to the jury, the prosecutor went beyond arguing that the jury should infer Appellant's guilt from the evidence which the Government had presented and called upon the Appellant's attorney to provide an explanation on behalf of the Appellant of the transcript of the taped telephone conversation between ROMERO and the Appellant. The prosecutor argued:

"I'd like you to read that translation, which you'll have in the jury room again. I want to hear-- I'm interested in hearing in summation Mr. Rappaport's explanation of it. No names at the beginning. Who am I talking to? With a friend. It's me. Yes. I already know. Did it go well? It went well. . . ." (B-21)

In Rebuttal summation the prosecutor compounded the error by again, in directing the jury's attention to the telephone conversation, improperly commenting on the Appellant's failure to provide some explanation of the meaning of the telephone conversation. (B-68)

" . . . Gee, you know, that phone call I asked, I thought maybe there would be some explanations for the languages in that phone call. If there was some, I guess I must have missed it."

The prosecutor's remarks constituted impermissible comment on the Appellant's failure to take the stand since such remarks were manifestly intended or would naturally and necessarily be understood by the jury as such comments. *United States v. Wilson*, (5th Cir. 1974) 500 F.2d 715, 722, cert. denied 420 U.S. 977, 95 S.Ct. 1403, 43 L.Ed.2d 658.

In *United States v. Smith*, 500 F.2d 292 (6th Cir. 1974) Judge McCree, writing for the Court addressed the same issues presented in the instant case, to wit: whether the prosecutor's statement in closing argument, which called upon the defendants, who had not testified, to present the jury with their explanation of the meanings of a taped intercepted telephone conversation other than the meaning which the prosecutor had indicated, was improper.

In appealing the conviction, the defendants argued that the prosecutor's comments in the closing argument were improper and constituted reversible error. In reversing the convictions the Appellate Court stated at 294 and 296:

" . . . we hold that the prosecutor's comments were improper because they had the effect of shifting the burden of proof from the government to the defendants and abrogating the presumption of innocence to which appellants were entitled. They also focused the jury's attention on appellants' failure to testify and penalized, by implication, appellants' exercise of their constitutional privilege against self-incrimination . . .

We are convinced that the prosecutor's argument here that the jury should require the defendants to present an alternative explanation of the telephone conversations, where the defendants in the exercise of their privilege declined to testify, was at least as improper and prejudicial to defendants as the comments on "uncontradicted" evidence proscribed in *DESMOND* and in *FLANNERY*."

In the Desmond and Flannery cases cited by Judge McCree, the Court held that the prosecutors' comments in the course of final argument to the jury, that certain of its' evidence was "uncontradicted", where only the defendants, who did not take the stand could have been called to contradict the evidence was an unconstitutional comment because contradiction would have necessarily required the defendants to take the stand and therefore called the jury's attention to the fact that they failed to testify. United States v. Flannery, 451 F.2d 880 (1st Cir. 1971); Desmond v. United States, 345 F.2d 225, (1st Cir. 1965)

In the case before this court, the prosecutor's statements in his closing argument calling upon Appellant's attorney to provide the jury in summation with an explanation of the taped telephone conversation, where the Appellant in the exercise of his constitutional privilege against self-incrimination, declined to testify, was prejudicial and requires reversal.

Since the record clearly establishes that the Appellant was the only other party to the said telephone conversation of February 1, 1977, there was no one other than the Appellant whom the Appellant could call upon to render such explanation. The prosecutor's comment, of necessity pointed to the Appellant and drew the jury's attention to his failure to take the stand and offer testimony in explanation thereof. In so doing, the prosecutor abridged Appellant's constitutional rights under the Fifth Amendment. The government made the argument because they thought it would be effective. The Court in Desmond stated at 227:

"We can think of no effect other than to invite the jury's attention to the fact that the defendants had not taken the stand."

The remarks constitute reversible error because they had the obvious effect of shifting the burden of proof from the the Government to the Appellant. Such comments, twice repeated, were a naked attempt to abrogate the defendant's presumption of innocence before the minds of the jury. The jury was, therefore,

irresitably invited to draw inferences about the telephone conversation compatible with guilt unless the Appellant complied with the prosecutor's statement and came forth with explanations to evidence the fact that the jury should not draw any inferences in support of guilt. In ascribing criminal intent to such taped telephone conversation, the prosecutor in his summation stated: (B-19)

" About the transcript, how is it that I was here until five? I just suggest to you that this is the cocaine deal, Lopez is involved in it."

In calling for an explanation of the telephone call the prosecutor clearly attempted to shift the burden of proof from the government to the Appellant, direct the jury's attention to the fact that the Appellant did not testify and thereby invite the jury to draw such inference in support of guilt.

The Supreme Court has clearly has clearly proscribed such prosecutorial comment in holding that the Fifth Amendment privilege against self-incrimination prohibits the government prosecutor from suggesting that inferences unfavorable to the accused may be drawn from Appellant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed2d 106 (1965)

The fact that the prosecutor called upon the Appellant's attorney rather than the Appellant himself to provide such explanations of the telephone conversation in no way lessens the prejudicial nature of the prosecutors comment. As the Court stated in Desmond at 227:

"Unless it is apparent on the record that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have of fered the contradiction, the defendant himself."

The error was plain and infringed upon the Appellant's constitutional rights.

After the prosecutor committed the initial error of improperly seeking to compel the Appellant through his attorney to explain the taped telephone conversation, he proceeded to commit further error when he called upon the defendant to produce certain work records and called the jury's attention to the Appellant's failure to offer such evidence in his behalf. He stated: (B-25)

"In conclusion, Mr. Rappaport, as I said before, has subpoena powers. Do you remember he asked the so-called question, got in a lot of stuff where Mr. Lopez was supposedly working. Where are the work records if he was working at this place, whatever it was, on that day? Could have brought them in."

Although counsel for the Appellant had not objected to the prosecutor's previous improper comment in order to avoid impressing its serious prejudicial effect on the minds of the jury, counsel was compelled to interpose an objection even at the risk of incurring the jury's displeasure with such interruption during the prosecutor's summation. The Court in sustaining counsel's objection told the prosecutor that the Appellant did not have to produce anything or any evidence twice (B-26) during the side bar.

Notwithstanding the Court's ruling that the Appellant did not have to produce any evidence on his behalf and that the prosecutor could not comment on Appellant's failure to produce any evidence, the prosecutor saw fit, in defiance of the Court's ruling to again refer to the fact that the defendant did not offer any explanation of the taped telephone call in Rebuttal Summation. (B-68)

In directing the jury's attention to the fact that the Appellant failed to provide evidence on the Appellant's own behalf he again invited the jury to draw the inference that such failure to produce such evidence was compatible with guilt.

The government having improperly but effectively breached the protective cloak of the the Fifth Amendment which the Appellant had invoked, thereby shifted the burden of proof by repeatedly inviting the jury's attention to the fact that the Appellant failed to testify or offer any evidence or proof in his behalf. In so doing, the prosecutor committed reversible error, in denying the Appellant his right to a fair trial.

POINT II

THE COURT ERRED IN FAILING TO ISSUE CAUTIONARY INSTRUCTIONS TO THE JURY THAT NO ADVERSE INFERENCE COULD BE DRAWN FROM APPELLANT'S FAILURE TO TESTIFY OR PRODUCE EVIDENCE IN HIS BEHALF

The challenged comments of the prosecutor are clearly improper and prejudicial argument. It is the duty of the prosecutor to advance the government's cause with force and persuasiveness; and in performing this duty, the prosecutor should be allowed to zealously employ all legitimate skills of advocacy. *United States v. Smith* at 295.

As Mr. Justice Southerland wrote in *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)

"He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

However, in the present case, the prosecutors comments transgressed the bounds of legitimacy. His statements raised the clear implication to the jury on summation and rebuttal summation that if the Appellant could have explained the meaning of the taped telephone conversation he should have testified; that the jury was further led to believe that since the Appellant could have offered evidence on his behalf by the use of subpoena power, it was incumbent on the Appellant to produce such evidence.

The prosecutor's statements in closing argument constituted an improper and highly prejudicial comment on the failure of the accused to testify which comment is forbidden by the Fifth Amendment. U.S.C.A. Const. Amend 5.

Pursuant to the ruling in Chapman v. California, 386 U.S. 18, 24, 87 U.S. 824,828, 17 L.Ed. 2d 707, 710-711 (1967) before a federal constitutional error can be held harmless the court must be able to declare a belief that it is determined to be "harmless beyond a reasonable doubt."

The Supreme Court discussed the doctrine of the application of the harmless error to cases where error has resulted from improper evidence being presented to the jury in Kotteakos v. United States, 328, U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)

"And the question is, not whether they were right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting . . .

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of congress But if one cannot say, with fair assurance, after pondering all that has happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not effected. The inquiry cannot merely be whether there was enough to support the result, apart from the phase affected by the error, It is rather, even so, whether the error itself had any substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."Kotteakos at 764-765, 66 S.Ct. at 1247.

In United States v. Smith, the Court at the conclusion of the prosecutor's summation sought to render the prosecutor's error

harmless when it issued cautionary instructions after the prosecutor improperly called on the defendants to provide explanations of the intercepted telephone calls which the prosecutor claimed contained some cryptic references to wagering activities. After admonishing the prosecutor as provided in *United States v. Flannery* at 882 by advising the jury that his remarks were improper and should be disregarded the Court further instructed the jury as follows:

" . . . he also stated that if they, meaning the defendants' counsel, have some other reasonable alternative to suggest as to what the call means that you should require them to show that to you

. . .
The government has the burden to prove the defendants guilty beyond a reasonable doubt and neither the defendants nor their attorneys are required to explain to you why they believe they are innocent or give you any explanation what the taped telephone calls mean. The defendants have no duty to show anything. The government has the burden of proof and this burden never shifts to the defendant in a criminal case." (Emphasis supplied.) *United States v. Smith* at 295.

The Circuit Court held that the District Court's subsequent cautionary instructions failed to render the error harmless. In reversing the conviction the Court stated; at 298:

" Although the District Court clearly charged the jury that the burden of proof was on the government, and that the appellants were not required to explain anything, the cautionary charge expressly failed to instruct the jury that no adverse inference could be drawn from appellants' silence concerning the meaning of the telephone calls. Such an instruction was necessary because the government's argument had called attention to appellants' failure to testify and to provide an innocent explanation of the telephone calls. (Emphasis Supplied)

In order to render the errors in the present case "harmless", the District Court in recognition of the plain errors was required to provide the jury with cautionary instructions as set forth in *United States v. Smith*.

However, in apposition to the Smith case, the District Court not only failed to instruct the jury that they were not permitted to draw any unfavorable inferences, whatsoever, from Appellant's failure to testify, but failed to provide any cautionary instruction at the time of the prosecutor's comments or at the close of prosecutor's summation relative to the specific errors made by the prosecutor.

The absence of such cautionary instructions in an effort to dispel and eradicate the prejudicial effects of such improper comments from the minds of the juror failed to render the errors harmless in the minds of the jurors. *United States v. Smith*.

While there was general instruction in the body of the Court's general charge to the jury that the burden or duty of calling any witness or producing any evidence is never imposed on a defendant (B-24); and that the Appellant need not have taken the stand and testify (B-80) and no presumption of guilt may be raised or inference of any kind drawn from the failure of the defendant to testify (B-81), such instruction was not sufficiently connected or forceful to overcome the references by the prosecutor to Appellant and his failure to testify. *Wilson v. United States*, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed 650. It was essential that the District Court relate such cautionary instructions to the specific incident. *Smith v. United States*, 268 F.2d 416 (9th Cir. (1959)).

The District Court's failure to provide such cautionary instructions assumes even greater significance in a trial of such brief duration, to wit: Four days, in which such improper comments were made not only after all the evidence had been presented but at one point, prosecutor's prejudicial comment was made in Rebuttal Summation after the defense had concluded its summation. This is particularly true where the evidence presented by the government is less than clear and convincing. In *United States v. Burse*, 531 F.2d 1151 (2d Cir. 1976) Judge J. Joseph Smith, writing for this Court stated at 1155:

"Perhaps if the case against Burse had been stronger,

these improper comments would be of less significance. However, in an admittedly close case such as this, prosecutorial misstatements take on greater importance, whether these statements are intentional or not."

In quoting from *Berger v. United States*, 295 U.S. 78, 88-89, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935) the Court said at 1155:

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence."

After the government rested, the Court, in denying the Appellant's motion to dismiss the case on the grounds that the government had not proved a prima facie case, characterized the case as follows:

"THE COURT: I will deny it for this reason: That the overt act is the act that seems to be proven. Other than that, it is a very tenuous situation. I will not disagree with you, but I think there's just enough for it to go to the Defendant's case at this point . . . (B-90)

. . . and maybe go to the jury eventually." (B-91)

In large part the Court's characterization was based upon the fact that the testimony of the government's main witness, ROMERO was so replete with contradictory testimony and lies that the Court in commenting on ROMERO'S testimony outside the jury's presence stated:

"THE COURT: . . . I can say that there is an awful lot to be desired in his testimony. There is an awful lot to be desired. He's about the closest or the worst that I have had in 21 years. . . (152)

. . . But there's an awful lot to be desired. The worst criminals I have had were not as bad . . . (153-154)

. . . THE COURT: I have heard enough narcotics trials in my lifetime of importation of cocaine . . . and what methods are used to bring it into this country. This testimony completely belies the general methods-- completely belies . . . It's completely belying to me. (160-161)

The government's case depended on Romero's testimony, the taped telephone conversation and in part on surveillance by government agents. In view of the fact that upon cross examination ROMERO'S answers in most respects contradicted and put the lie to his previous Grand Jury testimony and testimony on direct examination

and inferentially he must be guilty. He called upon the common expectation of the jury to conclude that if the Appellant weren't guilty he would take the stand in his own behalf. The jury would be led to conclude by inference that Appellant's failure to testify is in effect an admission of guilt.

The jury was similarly led to conclude that Appellant's failure to offer evidence on his behalf inferentially means that the Appellant's refusal supports the theory of guilt.

This is precisely what the prosecutor accomplished by his improper remarks. He shifted the burden of proof from the Government to the Appellant.

The prosecutor's improper argument to the jury abrogated the presumption of innocence to which this Appellant was entitled. The Court in failing to admonish the prosecutor before the jury for such improper remarks; in failing to clearly explain to the jury what the rights of the Appellant were in an effort to clear the cloud created by the prosecutor and dispel and eradicate the prejudicial effects of the prosecutors remarks and in failing to clearly instruct the jury in a forceful manner, so that there would be no question in the jury's minds, that no unfavorable inference could be drawn by the jury because of the prosecutor's several errors, all serves to create the conclusion that the error had a substantial influence upon the jury's verdict. Accordingly it would be impossible to conclude that substantial rights of the Appellant had not been effected requiring a reversal of the conviction.

POINT III

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW
AND THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS
THE INDICTMENT AT THE CONCLUSION OF THE GOVERNMENT'S CASE.

it was imperative that the government bolster its case against the Appellant with the taped telephone conversation as it was the only evidence that the government could display to the jury of any actual discussion between ROMERO and the Appellant.

However, a careful analysis of the transcript cannot but emphatically demonstrate that the contents of the conversation are completely and wholly devoid of any references, oblique or otherwise, by which it could be inferred that the conversation referred to the crime alleged in the indictment. (EX-2). The transcript was offered in evidence in proof of the indictment, but the words, the conversation of and by itself, simply and clearly did not contain references to the importation of cocaine.

Unlike the intercepted telephone calls in *United States v. Smith*, at 296, there was no "cryptic or esoteric" references to the crime charged. The conversation was in Spanish and would offer ROMERO and the Appellant more freedom of speech and direct reference to narcotics if that was, indeed, the purpose of the call.

Therefore, in order for the jury to determine that the taped telephone call was in some way specifically referable to the crime charged in the indictment it would be necessary to draw such inferences and it was the government's burden and solely the government's burden to present the evidence as would enable the jury to draw such inferences. The burden of proof was exclusively that of the United States and the government may never transfer or seek to in any way, shift the burden of proof from itself to the Appellant but that is exactly what occurred in this case.

The prosecutor, in calling upon the defendant through the guise of referring to the Appellant's attorney, to present the evidence necessary to explain away the inferences which the government wanted to ascribe to such telephone call in reality said to the jury if he won't come forth and try to explain the conversation to you, it's because he is afraid to testify

The government failed to prove beyond a reasonable doubt that the conspiracy existed at or about the time that was alleged in the indictment.

The indictment alleged that the conspiracy commenced on or about June 1, 1976 and continued until February 1, 1977.

The record clearly shows that there was no agreement to conspire in existence in June, 1976. (68-72)

The government sought to prove that the conspiracy came into existence some time in late July or early August, 1976, when Romero was leaving the United States for the third time. His testimony on cross examination contradicted his claim on direct examination and before the Grand Jury that August, 1976, was the first time that the Appellant allegedly discussed bringing cocaine into the United States with Romero. His testimony was clearly a repudiation of his earlier testimony. He testified that the first time he discussed bringing cocaine and importing cocaine into the United States with Lopez was in January, 1977. He was specifically asked:

Q "Now, would you like to change your testimony?

A No.

Q No MR. RAPAPORT: He wants it to stay.

THE WITNESS: That's how it is.

Q And do you want to change your testimony?

A No." (72)

The inescapable conclusion to be drawn from such testimony is that Romero falsely created and fabricated the testimony he originally gave before the Grand Jury and direct examination at the trial, that he had discussed this with Lopez in August, 1976.

Romero even stated that he might have left to go to Venezuela in May, June or July, 1976. (85). If Romero had left at that time, he could not possibly have had the conversation which he testified occurred in August, 1977.(19). The conversation which allegedly took place between Romero and Lopez is so sparse, so inconsequential and so destitute of details that it beggars the imagination to accept the fact that such conversation ever occurred.

Romero's testimony now asserts that the conspiracy which did not occur on or about June 1, 1976, as alleged in the indictment or in early August, 1976, as originally testified to by Romero, actually occurred in early January, 1977. However, now Romero would have us believe that the conspiracy was created as a result of a telephone conversation. Although he testified that Lopez telephoned him he is curiously unable to remember the date, even the approximate date of such tele-call. The testimony which he volunteered on direct examination was as meagre and deficient in details as his prior testimony relative to the creation of the alleged conspiracy. He remembers or asserts that he remembers the call in the beginning of January, 1977. He states "that's when he called and asked me if I was ready to do it."

He admits that no one was present when the alleged call was supposedly made and offered no other form of proof to substantiate such naked assertion. When questions relative to such telephone conversation were posed to Romero about the conversation that took place in the early part of January, he invariably replied with respect to a telephone conversation that he claims he had at the end of January, 1977. When asked:

" Q . . . You have testified that you had a conversation with Mr. Lopez at the beginning of January, 1977; is that correct?

A Yes.

Q And how did you have this conversation with him?

A Well, I was supposed to arrive on Sunday. And when I--when I did not arrive --

Q What date was this? When? At the beginning of January, did you call him?

A Two days before I was supposed to come here. I was -- was supposed to arrive on Sunday.

If the testimony of Romero was to be believed and Romero and the Appellant, in fact, had commenced the conspiracy in early January, 1977, Romero would have had to tell the Appellant he was arriving in New York with the cocaine in Sunday, January 30, 1977, at the time of that telephone conversation. The reason, of course is obvious. Other than this telephone conversation alleged by Romero, the record is devoid of any other communication by Romero or any other person between early January and January 30, 1977, that Romero was going to arrive in New York on that day. In other words, unless Romero told the Appellant that he was coming on Sunday, there was no way based upon the record that the Appellant could expect Romero's arrival on that day.

Yet, in the face of this indisputable fact, Romero had the effrontery to testify that the Appellant telephoned him from New York on or about January 30, 1977, to inquire as to why he had not arrived that day. If the Appellant did not know that Romero was coming to New York, how could he possibly have called him and asked why he did not arrive. The answer is clear. The testimony of Romero was completely untrue and was a pure fabrication. There was no telephone conversation with the Appellant in early January, 1977, or on January 30, 1977.

While Romero insisted that he was called on both occasions by the Appellant from New York, a position he refused to budge from, he had obviously told the prosecutor and Agent Giamo something other than he testified to at the trial.

For example, in his opening statement, Mr. Huffman clearly states that when Romero returned to Venezuela, Romero, not the Appellant, called New York from Venezuela to confirm their alleged agreement. (5) Not only was Mr. Huffman of the opinion, obviously based upon his interview with Romero, that Romero had told him that he, Romero had called New York but Agent Giamo notes in his interview of Romero stated. "When he couldn't come Sunday, Romero called Lopez to say he would arrive Tuesday." When asked whether he said that to Giamo he avoided the confrontation by stating he did not

know, was not sure and did not remember. The government seemed equally surprised at the testimony of Romero since had it known of such testimony which could be damaging to the Appellant, it would have brought it out on direct examination. In fact, there had been no reference to any telephone conversation on January 30, 1977, either before the Grand Jury or on direct examination. If there had been any truth to Romero's testimony that after his arrest he decided finally to cooperate the government would have leapt at the opportunity to exploit same at the trial. The testimony of Romero was fraud upon the Court and the testimony relative to these alleged telephone conversations were a creation of Romero's imagination, conceived by the necessity of protecting the person or persons who were the intended recipients of the cocaine. By no stretch of the imagination can it be said that the government proved the existence of the alleged conspiracy involving this Appellant, beyond a reasonable doubt.

If Romero's credibility is evaluated in this trial, his testimony is so replete with lies, contradictions and efforts to avoid the truth that it should not be accepted. The government has failed to prove that the Appellant knowingly and wilfully entered into the conspiracy alleged.

It is reasonable to assume that if the Appellant had been a part of the conspiracy and since the taped telephone conversation was conducted in Spanish that he would somewhere allude to whether Romero had brought in the cocaine but the language of the taped telephone conversation makes no reference whatever to the crimes charged in the indictment. Moreover, when Romero was asked on cross examination whether at the time that they met in the coffee shop Lopez in any way addressed any questions to Romero as to the success of the alleged conspiracy, he replied in the negative. (184-187)

Appellant did not meet Romero in furtherance of the alleged conspiracy since Romero's testimony relative to the conversations and the telephone are illogical and incredible on their face.

Even the Court stated outside the presence of the jury that Romero's testimony about the importation of cocaine in this case simply belied the general methods. (160). With respect to Romero's testimony before the Grand Jury as compared to his testimony at the trial, the Court stated:

"THE COURT: . . .The fact is that the testimony indicates he said one thing here and another thing there" (200)

The government did not prove beyond a reasonable doubt that the overt act was knowingly done in furtherance of the purpose of the conspiracy, beyond a reasonable doubt. Romero and the Appellant had agreed to meet on 55th Street and Seventh Avenue and not in a coffee shop. Had Romero not been in the coffee shop the Appellant would not have stood outside waiting for him. It must be admitted that if, in fact, the Appellant did see Romero in the coffee shop, it would be outrageous to suggest that he would stand outside in the cold for 45 minutes to an hour. Even utilizing the theory of the reasonable man or in this case the alleged unreasonable man, if he had seen him earlier, he would have gone in to the coffee shop earlier. It is reasonable to assume, even taking the view most favorable to the government, the only realistic conclusion that can be drawn from his remaining outside was that he did not see Romero. Certainly neither Giamo or Romero testified that they could see Lopez by looking through the window. If he did in fact see Romero and he was involved in the conspiracy and Romero looked back at him, a reasonable man would be compelled to conclude that something was amiss since Romero did not come out to greet him but merely stared back through the window of the coffee shop.

The record established that Romero had a record. He had been arrested and convicted of having stolen a car in Venezuela which he tried to hide on cross examination (171-175) He had been arrested for possessing marijuana and was incarcerated in a Juvenile Hall for five months (177) However, Romero lied to the Probation officer when he claimed he was not prosecuted in conjunction with the marijuana charge (B12-13)

Contrary to his assertions that this was the first time he had ever been involved with cocaine he clearly evidenced the fact that he had, contrary to his previous testimony, received cocaine at his home on many occasions. (122) Therefore, he was conversant with the world of narcotics and his statements made to implicate the accused were made for the purpose of protecting the persons who were in fact to receive the drug.

If the Appellant were truly a conspirator and he had been told by Romero that he was bringing the cocaine into the United States and he knew that Romero would arrive at 1:15 P.M. on February 1, 1977, he would have arranged to meet him at the airport and if Romero was supposed to call him at 6:00 P.M. after his arrival and the Appellant had expected him to be carrying cocaine for delivery to him, it would be reasonable to assume that he would have picked up the telephone immediately and not let it ring nine times before answering it.

The testimony of Romero is so perjurious and illogical that it can only be concluded that the Government failed to sustain its burden of proof and the Court erred in failing to dismiss the indictment on the grounds that the evidence was, as a matter of law, insufficient to sustain a conviction of the Appellant.

If in fact, the Appellant had conspired with the unindicted co-conspirator to import cocaine, the method of proof was in the hands of the Special Agents. Since they had three cars and five agents, they had but to allow the drama to play itself out. Since the Appellant and Romero were under close surveillance they could have permitted them to take a cab and follow them to their alleged destination and determine if the Appellant was involved in the alleged conspiracy (B-78-83) In fact the investigation was so poorly conducted that when Giamo put Romero in the lobby of the International Arrivals Building he said he did not ask him what time he was supposed to have been met (B-57) and when he asked Romero who was to meet him and Romero said he did not know he just simply accepted that answer and in so doing forfeited any chance of

of arresting whoever might have met Romero (57-59) The government failed to prove its case beyond a reasonable doubt. There was insufficient evidence for the jury to conclude beyond a reasonable doubt that the Appellant was guilty of the offense charged.

C O N C L U S I O N

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED

Respectfully submitted,

ROBERT J. RAPOPORT
Attorney for the Appellant.

RJD:RLH;jmb
#771,379

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ MAR 31 1977 ★

TIME A.M.

P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

- against -

JOSE EDGAR LOPEZ,

Defendant.
----- X

SUPERSEDING INDICTMENT

Cr. No. 77 CR 81(S) (2)
(T. 21, U.S.C., Sections
841(a)(1), 846, 952(a)
and 960(a)(1), and T. 18,
U.S.C., Section 2)

THE GRAND JURY CHARGES:

Commencing on or before June 1, 1976 and continuing up to and including the 1st day of February, 1977, within the Eastern District of New York, the defendant JOSE EDGAR LOPEZ, Arturo Romero an unindicted co-conspirator and other persons unknown to the Grand Jury, did knowingly and wilfully combine, conspire, confederate, and agree together to unlawfully import into the United States from Venezuela, and to possess with intent to distribute approximately three hundred twenty eight (328) grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1), 952(a) and 960(a)(1).

In furtherance of the said unlawful conspiracy and in order to effectuate the objectives thereof, the defendant JOSE EDGAR LOPEZ and Arturo Romero committed the following:

OVERT ACTS

1. On or about the 1st day of February, 1977, Arturo Romero imported into the United States approximately three hundred twenty eight (328) grams of cocaine hydrochloride by carrying said cocaine into the Eastern District of New York aboard an airplane which flew from Venezuela to Kennedy Airport, N.Y.
2. On or about the 1st day of February, 1977, the

defendant JOSE EDGAR LOPEZ travelled to the corner of 7th Avenue and 55th Street, New York, New York and met Arturo Romero at or near that location. (Title 21, United States Code, Section 846).

A TRUE BILL


FOREHAN

4

DAVID G. TRAGER
UNITED STATES ATTORNEY
Eastern District of New York

DATE	DOCUMENT NO.	DESCRIPTION	EXCLUDABLE DELAY
			Start Date (a)
/18/77	B	Costantino, J--case called & adjd to 4/25/77 for trial.jlj	
-25-77		Before Costantino J - case called - deft & atty Robert Rappaport present - case adjd to May 16, 1977 for trial. Bail reduced to \$20,000 or 10% cash - case adjd to May 16, 1977 for trial. rs.	
-5-77		Notice of readiness for trial filed.	
5.6.77		By Costantino, J.- Order Releasing Bail filed.	
/9/77		Copy of order By Costantino, J order releasing bail.jlj	
/16/77		Before Costantino, J-case called-deft & counsel present' adjd to 6/13/77 on consent.jlj	
.13.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Adj. to 7.18.77 for Trial.	
.18.77		Before Costantino, J.- Case Called and trial adjd. to 7.25.77.	
6 7-25-77		Before Costantino J - case called - deft & atty Robert Rappaport present - trial ordered and begun - jurors selected and sworn - trial contd to 7-26-77.	
.26.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. opens. Trial continued to 7.27.77.	
-28-77		Before Costantino J - case called - adjd to 8-5-77 on consent.(for sentence)	
/29/77		Before Costantino, J-case called-deft & atty present-trial resumed-trial contd to 7/28/77.jlj	
-1-77		2 transcripts filed (one dated July 26 and one dated July 27, 1977)	
/29/77		By Costantino, J Order of sustenance filed.jlj	
/29/77		Before Costantino, J-case called-trial resumed-deft & atty present-court charges jurors-order of sustenance signed-jury deliverates at 3:30pm-jury returns at 5:35pm & finds deft guilty as charged-jury polled & discharged sentence adjd w/o date.jlj	
.16.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Sentence adjd. to 9.23.77.	
/23/77		Before Costantino, J-case called-deft & counsel present deft sentenced for a period of 5 years to serve 6 mos & balance on probation & a special parole term of 10 years & to be deported-sentence stayed until 10/6/77.	
23/77		Judgment & commitment filed. Certified copies to Marshall & Probation.jj	
-3-77		Before COSTANTINO, J. - case called- deft & atty. present - motion to stay execution of sentence pending appeal granted - bail reduced by \$1,000.00.	
-3-77		By COSTANTINO, J. - Order releasing bail filed.	
-4-77		Two transcripts filed dated July 28, 1977 and July 29, 1977 respectively.	
-7-77		NOTICE OF APPEAL FILED. Docket and Notice to C of A. mg with form A. mg	
-25-77		CJA#23 financial affidavit filed.	

RECEIPT NUMBER

C.D. NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

Jose Edgar Lopez & ano

77 81

Yr. | Docket No. | Def

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
10-28-77	Letter filed from Robert Jay Rappaport, Esq. dated 10-26-77 enclosing letter from counsel of March 23, 1977 with request that same be placed in said file re bill of particulars, etc.				filed
11-14-77	Scheduling order filed that the record be docketed on or before Nov. 29, 1977.				
11-26-77	Stenographer's transcript dated 10-25-77 filed.				sk
11-29-77	Record on appeal certified and mailed to Court of Appeals.				sk

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ROBERT J. RAPOPORT, being duly sworn, deposes and says that he is not a party to the action and is over the age of 18 years and resides at 45 Fox Hunt Crescent, Syosset New York.

That on the 30th day of January, 1977, at 225 Cadman Plaza, Brooklyn, New York, deponent served the within brief and appendix on the United States Attorney for the Eastern District by delivering a true copy hereof to his secretary. deponent knew such person so served to be the person mentioned and described in said papers as the United States Attorney therein.

Sworn to before me this
30th day of January, 1977

Bernard P. Rose

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-888025
Qualified in Queens County
Commission Expires March 30, 1978

